

instead an attractive option for cellular carriers, thereby increasing the participation of minorities in viable PCS systems.

Both of these proposals can be accomplished by exemptions to the PCS aggregation rules and would serve to expand the economic opportunities for designated entities while at the same time providing better service to the public.

c. Reclassification of 20 MHz Block

The Commission has the ability to make a dramatic move which, by itself, would significantly enhance the opportunities for designated entities to participate in PCS. Having already determined that a 20 MHz BTA set-aside is warranted, the Commission should reclassify that block for MTA use, thereby giving it instant viability, reducing the transaction costs to those bidding for regional or nationwide systems on that block and making that block more attractive to others which will increase the economic potential of the set-aside.

Again, Commissioner Barrett's dissent in the PCS Order makes the salient point: "The MTA licenses will be strong from the start and get stronger over time. Other than cellular companies who can use a 10 MHz sliver in a BTA,

. . . [the other] BTA allocations will whither in the ensuing chaos."<sup>19/</sup>

By reallocating the 20 MHz set-aside for MTA use, the potential for economic and technological isolation of the set aside 20 MHz BTA will be eliminated, and the congressional mandate will be significantly advanced.

## 2. Bidding Preferences

In the NPRM the Commission briefly references the possibility of adopting "bidding preferences" for designated entities. NPRM at ¶ 73. Although this proposal is not further discussed in detail in the NPRM, CIRI assumes that such a preference would be applied when a designated entity is bidding for a non-set-aside block of spectrum and, thus, is bidding against non-designated entities for that spectrum. In this regard, the "preferences" appear similar to the "bidding credits" proposed by the FCC's Small Business Advisory Council ("SBAC") and discussed by the Commission in footnote 61 of the NPRM. The SBAC approach involves "alternative bidding calculations" pursuant to which certain bidders would be permitted to discount or amortize the bid they would otherwise pay based on a

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<sup>19/</sup> Id. at 12.

qualitative assessment of the applicant's business development proposal.<sup>20/</sup>

CIRI urges the Commission to adopt bidding preferences for designated entities when bidding for non-set-aside spectrum. To implement such a bidding preference, the Commission should adopt the SBAC recommendation to discount the price payable by a winning designated entity by a predetermined factor. As an alternative, CIRI suggests looking to the minority preference program maintained by the Department of Defense.<sup>21/</sup> Under that program, the Secretary of Defense must establish a goal of awarding five percent of the dollar value of several types of Department of Defense contracts to small business concerns owned and controlled by socially and economically disadvantaged individuals. To achieve this congressionally-mandated goal, contract bids from small disadvantaged business concerns receive a bidding "preference." However, rather than discounting the amount actually bid by such concerns, ten percent is added to the

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<sup>20/</sup> NPRM at ¶ 80 n.61. The SBAC proposal involves credits for "superior service proposals" by "technical and non-technical innovators." While the Commission sought comment on whether members of minority groups could be deemed to be "technical innovators" for purposes of the SBAC proposal (id.), the congressional mandate to the Commission permits it to apply such credits to minorities regardless of whether they are SBAC-defined "innovators."

<sup>21/</sup> See Section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816, 3973 (1986) (codified as amended at 10 U.S.C.A. § 2323 (West Supp. 1993)).

price of all competing offers. See 48 C.F.R. § 219.7002 (1992). A similar add-on to competing bids for spectrum licenses from non-designated entities could achieve the goals of the Budget Act.

The Commission should also consider enhancing bids from entities with minority ownership and participation in management. It could do so by means of an enhancement similar to the enhancement which is provided for minority owned and operated businesses in comparative broadcast licensing hearings. See, e.g., WPIX, Inc., 68 FCC 2d 381, 411-12 (1978) (discussing minority ownership and participation as an affirmative factor enhancing an applicant's proposal).<sup>22</sup> The enhancement in this circumstance could be a discount rate applied to a minority entity's winning bid calculated against the percentage of minority ownership (or control) of the bidding entity. The higher the percentage, the higher the discount to be applied to the winning bid.

### 3. Installment Payments

The Commission has requested comment on whether to allow designated entities to use installment payment plans with interest for bids within the set-aside blocks, and whether to afford this installment plan preference to

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<sup>22</sup> See also, e.g., Alexander S. Klein, Jr., 86 FCC 2d 423 (1981); Waters Broadcasting Corp., 91 FCC 2d 1260 (1982).

designated entities when they bid for non-set-aside blocks of broadband PCS spectrum. NPRM at ¶ 121. The Commission has also proposed to assess interest in an installment plan at the prime rate plus one percent, on a fixed or variable rate basis. NPRM at ¶¶ 80 n.57, 121 n.116.

CIRI supports the Commission's proposal to employ alternative payment plans for minority entities. As the SBAC has noted, installment plans can foster economic opportunities for minorities and women. SBAC Report at 15. However, because the use of installment payments could operate as a loan to entities interested only in speculating on the value of the license, the Commission should permit only a relatively short term payment plan. CIRI believes that a term of five years (and in no event more than 10) would effectively ward off license speculators who would hope to rely on a "government loan" to support their initial acquisition of valuable spectrum.

While CIRI supports a relatively short term payment plan, it also urges the Commission to be more flexible with respect to the interest rate proposed in the NPRM. Whatever rate is selected, it should be one that does not result in the government making money on the "loans" to minorities. The Commission should be free to assess against a debtor charges to cover administrative costs incurred as a result of an installment payment, but it should not apply to a designated entity an interest rate greater than the

government's cost of money. Finally, the rate of interest should be fixed for the duration of the indebtedness to facilitate administration and planning both by the Commission and by the designated entities.

#### **4. Tax Certificates**

The Commission has requested comment on its proposal to employ tax certificates in the context of spectrum auctions. In particular, the Commission has proposed to use tax certificates in conjunction with auctions or the subsequent transfer of licenses (or interests in licenses) won at auction. NPRM at ¶ 79 n.58, 121. For the reasons that have traditionally supported the granting of tax certificates for sales of communications properties to minorities,<sup>23/</sup> CIRC supports providing a tax certificate where a minority transfers a spectrum-based license (whether won at auction or not) to a minority.

#### **D. Scope of Minority Preferences**

The Commission seeks comment on a number of issues which deal with the scope of the preferences to be accorded designated entities. In this regard, it asks whether minorities need not be given preferences if small businesses in general receive them (NPRM at ¶ 74); whether minorities should receive preferences outside of the set-aside spectrum

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<sup>23/</sup> See Minority Ownership in Broadcasting, 92 FCC 2d at 856; Nevada Independent Broadcasting, 71 FCC 2d 531, 533 (1979).

(id. at ¶ 21); whether rural telcos should receive preferences outside of their service areas (id. at ¶ 77); and whether a consortium including minority members should receive minority preferences (id. at ¶ 78). To the extent not discussed above, we address those issues in this section.

1. Limitation of Preferences to Small Businesses

a. Congress Required the Commission to Afford Preferences to Minorities as Well as Small Businesses

The Commission has requested comment on whether it could satisfy the congressional objectives with respect to minorities and women by affording preferences only to small business entities or whether the Commission should offer preferences tied specifically to an applicant's minority or gender status. NPRM at ¶ 74. The short answer to this inquiry is that the Commission cannot -- and should not -- limit preferences in this area to small business entities.

In adding subsection (j) to section 309 of the Communications Act of 1934, Congress directed the Commission "to ensure that small businesses, rural telephone companies, and businesses owned by minority groups and women are given the opportunity to participate in the provision of spectrum-based services" and to consider the use of preferences "for such purposes." Section 309(j)(4)(D) (emphasis added). In so doing, Congress directed the Commission to consider preferences for all of the enumerated groups and made clear

the distinction between the categories of "small businesses" and other (not necessarily "small") "businesses owned by minority groups and women." As the House Report emphasized, "the Commission should adopt regulations . . . to ensure that businesses owned by members of minority groups and women are not in any way excluded from the competitive bidding process."<sup>24/</sup>

If Congress had not intended that the Commission offer preferences to benefit each of the classes of businesses set forth in the legislation, it would not have had to enumerate the various groups. And if Congress had meant to benefit only small business owned by minorities and women it would have said so. Instead, it is clear that both small business generally as well as other businesses owned by minorities and women were the intended beneficiaries of the legislation. Congress directed the Commission to ensure that all of the groups listed are given an opportunity to participate in the provision of spectrum-based services, and the Commission cannot and should not distinguish between the groups in fashioning the benefits called for by the Budget Act.

The Commission's proposal to limit preferences to small businesses appears to have been prompted by a concern that to extend preferences to businesses run by minorities or

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<sup>24/</sup> H.R. Rep. No. 103-111 at 255.

women would run afoul of the Constitution. But as discussed above, the minority preferences proposed in this proceeding -- mandated as they are by Congress and supported by adequate findings -- will pass constitutional muster. This being the case, the Commission should rely on, and adhere to, the considered judgment of Congress in specifically mandating measures to ensure participation in spectrum-based services by minorities and women.

**b. In any Event, the Congressional Intent  
Would be Served by Affording Preferences  
to Disadvantaged Entities**

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If, because of its constitutional concerns and despite the clear congressional intent to the contrary, the Commission were disposed not to adopt the preferences for businesses owned by minorities and women based solely on race or gender, the Commission should establish bidding preferences addressed to the underlying criteria used by Congress when it adopted its list of designated entities, i.e., the disadvantaged nature of the entity.

When Congress declared that small businesses and minority- and women-owned businesses should be assured meaningful participation in spectrum-based services, its intent was to ensure the participation of groups who were disadvantaged in that they faced unique barriers to participation in the telecommunications industry. Those barriers were based on race, gender and lack of access to financing, as demonstrated by the fact that each of those

designated entities is vastly underrepresented in the industry. In turn, these circumstances were recognized in the Report of the FCC Small Business Advisory Committee ("SBAC Report"), where the SBAC explained that each of the designated groups faced different but equally effective barriers to entry into the telecommunications industry. See SBAC Report at 1-5.

While the SBAC Report recognized that the primary obstacle for small businesses is lack of capital,<sup>25/</sup> it reported that "women and members of minority groups have encountered special barriers to telecommunications ownership."<sup>26/</sup> The SBAC recounted that "there are often similarities between small businesses and minority businesses indicating that capital access is a problem for small businesses across the board, but 'minorities will have additional problems.'" SBAC Report at 4-5 (quoting Statement of Dr. JoAnn Anderson, PhD, Before the FCC Small Business Advisory Committee, May 27, 1993). Those barriers encountered by minorities include lack of traditional sources of financing, "undisguised discrimination in

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<sup>25/</sup> SBAC Report at 2

<sup>26/</sup> SBAC Report at 3 (citing Letter of Hon. Larry Irving, Asst. Sec. for Communications and Information, to Hon. James H. Quello, Acting Chairman, FCC, September 14, 1993 ("We encourage the Commission to develop rules to implement competitive bidding for PCS that will provide greater opportunities for participation by groups currently underrepresented in telecommunications industries.")).

education [and] employment opportunities," and "systemic barriers to technical training and employment opportunities."<sup>27/</sup>

Therefore, although, as shown above, preferences based on race or gender would in this case be constitutionally permissible, if the Commission is disposed not to adopt such preferences, it should adopt preferences for those broad economic -- as opposed to race or gender-based -- groups which Congress intended to benefit, i.e., those which are economically disadvantaged with respect to opportunities to participate in the provision of spectrum-based services. Under such a procedure, a preference would not be given solely on the basis of race or gender. Nor, however, would a preference be given solely on the basis of size. For example, a "small" business comprised of a group of white males with great personal net worth would not be faced with lack of capital, nor would it face the social disadvantages faced by minorities. Therefore, such a small businesses would not be "disadvantaged," would not be within the group of businesses about which Congress was concerned, and would not receive a preference.

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<sup>27/</sup> SBAC Report at 5 (citing Brief of the U.S. Senate as Amicus Curiae in Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997, (1990) at 32, 33; Telecommunications Minority Assistance Program, 1978 Pub. Papers 253 (President Carter)).

Accordingly, contrary to the Commission's suggestion in the NPRM, affording preferences based only on size will not fulfill the objectives of Congress. The best way to fulfill those objectives is to follow the law as Congress passed it by giving preferences to the entities enumerated in the legislation. Failing that, the Commission will fulfill the legislative intent only if it affords preferences based on disadvantage, be it social or economic disadvantage. The SBA definitions of socially and economically disadvantaged entities provided a good starting point in adopting eligibility standards under this approach. See 13 C.F.R. Part 124.

## **2. Minority Preferences Outside of Set-Aside Spectrum Blocks**

The Commission has requested comment on whether to afford installment plan preferences and apply its tax certificate policies in the context of transactions by (or with) designated entities involving non-set-aside blocks of broadband PCS spectrum. NPRM at ¶ 121. To fulfill Congress' mandate to enhance the participation of designated entities in the provision of spectrum-based services, the Commission should apply any installment payment or tax certificate policies to transactions involving designated entities generally; those preferences should not be limited to transactions affecting the blocks of spectrum to be set aside for such entities.

As noted above, the largest block of spectrum identified by the Commission as likely to be set aside for designated entities is the 20 MHz PCS Block C. Although the Block C spectrum is contiguous with the 30 MHz of spectrum in Block B, the 40 MHz aggregation limit announced by the Commission in the PCS Order prevents the holder of a 30 MHz license from aggregating spectrum with a minority-held 20 MHz license. The result is a set-aside 20 MHz block classified for BTA service that cannot be joined to a larger system (unless the Commission adopts the designated entity exemption proposed by CIRI in these Comments).

For this reason, the Commission will effectively relegate minority businesses to highly insulated service opportunities unless it assists minority enterprises in competing for spectrum blocks other than those set-aside for minority bidding. While minorities technically will be given the opportunity to participate in the provision of services in the set-aside spectrum, the quality of that participation will be limited by virtue of the aggregation ceiling and the other negative characteristics of the set-aside spectrum.

Affording installment payment preferences and tax certificates for transactions involving the non-set-aside spectrum blocks (including the 30 MHz MTA blocks) will assist minority enterprises in competing for those non-set-aside blocks. A winning minority enterprise will be able to

offer a broader range of services with a 30 MHz license than with the set-aside 10 or 20 MHz licenses and, as a result, will be better able to attract capital from outside investors. Accordingly, designated entities should be entitled to bid for -- and receive preferences in auctions for -- spectrum in non-set-aside PCS spectrum blocks. Similarly, licensees who assign 30 MHz or other PCS licenses to designated entities should be eligible for tax certificates. In this way, the congressional mandate to ensure that businesses owned by minority group members have an opportunity to participate in the provision of spectrum-based services will be realized.

### 3. Limitations on Preferences for Rural Telcos

The Commission has requested comment on whether rural telcos should be afforded preferential measures only where the license at issue covers a market area/reliable service area that also encompasses all or some significant portion of their franchised service area. NPRM at ¶ 77. The Commission is correct in suggesting that preferential measures for rural telcos should be limited to bids for licenses in their specific operating areas.

The opportunities that Congress mandated for rural telcos obviously were addressed to the concern that those telcos would be unable to win auctions for licenses in their service areas, thus perhaps sounding the death-knell for those telcos as wealthy outsiders provided PCS and other

services as substitutes for local telephone service. For this reason, the apparent congressional purpose in affording special treatment to rural telcos can be achieved by providing them preferences only for licenses in their service areas, whereas the preferences for minorities, women and small businesses have an obvious applicability without regard to geographic restrictions.

#### **4. Preferences for Minority-Inclusive Consortia**

The Commission proposes to make available to consortia which include minorities as participants the same investment incentives that would be available to individual minority business entities. NPRM at ¶¶ 78-79, 121. CIRI supports the Commission's proposal to apply preferences such as set-asides, installment payment plans, and tax certificates to transactions involving minority-inclusive consortia. Such a proposal will encourage non-minority firms to form partnerships and other ventures with minority firms for the provision of spectrum-based services. In turn, minority enterprises will enjoy greater access to capital and to larger markets than would otherwise be possible. However, as noted above with respect to eligibility requirements for a "minority" applicant, strict eligibility requirements (with respect to minority ownership and control of the consortium) should be applied to the minority-inclusive consortium if it is to be accorded minority preferences.

**III. THE COMMISSION MUST ADOPT ADEQUATE SAFEGUARDS  
TO PREVENT UNJUST ENRICHMENT**

**A. Safeguards: Financial/Payment Issues**

**1. Financial Information in Bidder Application**

The Commission discusses a number of issues relating to assessing the financial bona fides of applicants for licenses to be awarded through competitive bidding. We address in this section proposals concerning the financial information which should be required of all bidders and the special payment procedures applicable to designated entities.

The Commission has requested comment on what information should be required in a bidder's application to demonstrate that the bidder has the financial resources to construct and operate a facility if a license is awarded. NPRM at ¶ 80, 98, 102, 128. The Commission has noted that it intends "to limit bidding to serious qualified bidders . . ." to promote the rapid deployment of new technology. NPRM at ¶ 102. Toward this end, CIRI believes that the Commission should deter potential speculation on PCS and other licenses by calling for the disclosure of qualification information that only a serious and qualified bidder can produce.

The Commission proposes to apply the financial qualifications standard employed in the RSA cellular lotteries. NPRM ¶ 128. Under this standard, "applicants

would be required to demonstrate that they have the available resources to meet the realistic and prudent estimated costs of constructing and operating their facilities for one year." Id. An RSA applicant may meet this standard by demonstrating either that it has the current financial resources to do so, or that it has a "firm financial commitment" from a "recognized financial institution" that will enable it to do so. 47 C.F.R. § 22.917(c).

Regardless of what financial qualification standard is adopted by the Commission, it must be strict enough to weed out those who are not serious and qualified bidders. Moreover, because financial qualification will be the sine qua non of an applicant's ability to ultimately provide its proposed spectrum-based service, each applicant -- including minorities and other designated entities -- must be required to make the same financial showing as all other applicants. As far as financial qualifications are concerned, the Commission must establish a level playing field. In this regard, the SBAC proposal to permit designated entities to "self-certify" their financial qualifications in their applications cannot be considered seriously. NPRM at ¶ 80 n.60. To permit a firm to warrant its financial resources on the basis of a letter from an investment banker plus its "internal funds" and "bank commitments" would be to invite the type of license speculation that will do nothing to

assist legitimate minority-owned businesses to participate more fully in the provision of spectrum-based services.

Unless the Commission requires bid applicants to demonstrate that they have examined seriously the costs of constructing and operating the licensed service, and are in a position to meet those costs, then firms with no real ability to offer spectrum-based services will either warehouse the frequencies or market licenses for profit. In addition to eliminating opportunities for serious qualified firms, this practice would delay the delivery of service to the public and would deny the public the benefits of competition.

**2. Up-Front Payments and Deposits for Minority and Non-minority Bidders**

The Commission has proposed a plan to require each potential bidder to tender a substantial up-front payment as a condition of entry to the auction. The payment would be calculated based on the amount of spectrum and population covered by the license sought. NPRM at ¶¶ 102-03. Moreover, the Commission has proposed that before the high bidder in a given auction is declared the winner, the bidder must tender a nonrefundable deposit to the Commission. The Commission suggested that the difference between the up-front payment and 20 percent of the winning bid could be an appropriate measure for this deposit. NPRM at ¶ 107. Finally, the Commission proposed to keep any up-front

payments and deposits if an auction winner is later found to be ineligible, unqualified, or cannot pay a balance when due. In the alternative, the Commission proposed to bar such an applicant from any future auctions. NPRM at ¶ 109.

CIRI supports each of the Commission's proposals in this regard. CIRI believes that only serious and qualified bidders should participate in auctions for both set-aside and non-set-aside spectrum. The employment of an up-front payment in concert with a substantial deposit will help to deter unqualified bidders from entering those auctions. CIRI also favors the Commission's proposal to retain the up-front payment and deposit of any winning firm that is later found to be ineligible or unable to comply with the payment terms set by the Commission. In addition to keeping that deposit, the Commission should bar the applicant from participation in future FCC licensing proceedings, whether or not involving competitive bidding.

### **3. Payment Terms for Minority Bidders**

The Commission has proposed two specialized payment plans for successful designated entities. The first is an installment payment plan under which a designated entity will pay the full balance of the winning bid over time with interest assessed during the term of the repayment. NPRM at ¶¶ 69, 79. As indicated above, CIRI supports this payment plan, but believes that the Commission should limit the rate of interest to the government's cost of money. Moreover,

CIRI believes that the rate of interest should be fixed for the duration of the indebtedness to facilitate administration and planning both by the Commission and by the designated entities.

The second payment plan proposed by the Commission entails the use of royalty payments to the government out of funds earned by the designated entity from the use of the license. NPRM at ¶ 80. CIRI opposes the use of royalty payments. As the Commission recognized (NPRM at ¶ 70), royalty payments would be both costly and intrusive to administer. Because there is no commodity "output" in this field, the Commission would have to establish and enforce an accounting standard to link income dollars to the portion of the license for which compensation is being paid. Moreover, the risk of any loss or default under such a system falls not on the operating entity, but on the United States. Obviously, the royalty payment plan is not consistent with the Commission's goal to develop an auction system that is "simple and easy to administer." NPRM at ¶ 18.

In sum, the Commission should make due allowance for designated entities by permitting them to make installment payments at reasonable interest rates. But it should eliminate opportunities for bidders who are neither serious nor qualified by adopting strict financial qualification requirements to be reflected in applicants' initial applications, requiring substantial up-front payments and

deposits and imposing significant penalties upon those who fail to satisfy any of the financial requirements.

**B. Safeguards: Anti-Trafficking Provisions**

The Budget Act directs the Commission to implement measures, such as antitrafficking restrictions and financial disincentives, designed to "prevent unjust enrichment [of those entities to whom licenses are awarded] as a result of the methods employed to issue licenses and permits." See NPRM at ¶ 83; 47 U.S.C. 309(j)(4)(E). The Commission agrees that unjust enrichment is a potential problem in auctions where participation is limited in order to ensure the participation of designated entities. NPRM at ¶¶ 83-84. Therefore, the Commission requests comment on the use of antitrafficking restrictions and on financial disincentives to curb such abuse. NPRM at ¶ 84.

The Commission does not favor the use of antitrafficking restrictions. It observes that "an outright prohibition on transfer, even for a limited time such as one year, may block or delay efficient market transactions needed to attract capital, reduce costs, or otherwise put in place owners capable of bringing service to the public expeditiously." NPRM at ¶ 84. Therefore, the Commission proposes instead to adopt a complex system of financial disincentives to discourage premature transfer of licenses. Id.

CIRI agrees that measures are necessary to ensure that those licensees who obtain a license through the award of a preference are not unjustly enriched by the immediate sale of that license. Such speculation in licenses destroys the integrity of and the purposes behind the preference system. However, contrary to the Commission's apparent conclusion, antitrafficking restrictions -- of limited but reasonable duration -- are the most effective and efficient means of preventing such abuse. CIRI therefore endorses a two-year prohibition on the sale of licenses obtained by means of a preference. However, in cases where the license is being transferred to a minority-owned entity, the purposes behind the preference system (i.e., increased minority participation in telecommunications) dictates that any trafficking prohibition should be waived.

The Commission's concern that such a holding period would result in the unreasonable delay of service to the public is not reflected in the Commission's use of such restrictions in other services. For example, in broadcast, licensees who obtain the license pursuant to the Commission's Minority Ownership Policy are restricted from transferring the license for one year after commencement of service "in order to protect the integrity of the policy." Amendment of Section 73.3597, 99 FCC 2d 971, 974 (1985). At the same time, the one-year requirement is waived for transfers "to a minority-owned or controlled entity in

furtherance of our Minority Ownership Policy." Id. See also 47 C.F.R. § 73.3597(a). The same policy applies to low-power television licensees who obtain the license by means of a minority preference, since a rapid transfer of licenses "would undermine the intent of the preference scheme." Random Selection Lotteries, 93 FCC 2d 952, 972-73 (1983); Low Power Television Service, 51 R.R.2d 476, 518 (1982); 47 C.F.R. § 73.3597(a).

Even in the Public Mobile Radio Service, where no minority preferences are awarded, the Commission has found it necessary in some instances to impose a one-to-three-year holding period as "a deterrent for insincere applicants to speculate in unbuilt or newly built facilities." Cellular Lottery Rulemaking, 98 FCC 2d 175, 217 (1984); Cellular Unserved Areas, 6 FCC Rcd 6185, 6223 (1991); Cellular Renewals, 7 FCC Rcd 719, 725 (1991); 47 C.F.R. §§ 22.40(b)(2), 22.40(c), 22.920(c). A three-year anti-trafficking restriction is also applied to cable licensees under the 1992 Cable Act, but is waived for sales to minority enterprises. See 47 C.F.R. § 76.502 (1993).

For the reasons the Commission has relied upon in those areas, CIRI supports an antitrafficking period of two years for licenses won with the use of designated entity preferences. A longer period is not necessary or beneficial for the same reasons discussed by the Commission when it reduced the broadcast antitrafficking period for

construction permits granted in comparative hearings or distress sales from three years to one year. As the Commission said, a longer period

prohibits a willing buyer ready to pay the market price from taking over the station, while forcing the seller to continue the operation of a facility it no longer desires or cannot support. The public stands to suffer reduced service from a failing operation, and will not in any case receive the improved service which a more willing operator or a new infusion of capital might provide.

Amendment of Section 73.3597, 52 R.R.2d 1081, 1082 (1982).

In the NPRM, the Commission proposed a system "of financial disincentives" in lieu of anti-trafficking provisions to prevent unjust enrichment from the "premature sale of a license" won at auction by a designated entity. NPRM at ¶ 84. However, explicit restrictions on the transfer of licenses obtained through preference would be far easier to implement than a system of financial disincentives where every figure used in the "penalty" formula will be contested by one party or another.

For example, requiring a payment that is "based on the estimated difference between the price paid at the auction and the price that would have been paid without the set-aside" (NPRM at ¶ 85) is an invitation to protracted litigation over the hypothetical price that "would have been paid." Likewise, even the Commission recognized that its proposal for a penalty in an amount "equal to a certain percentage of the difference between the initial bid price

and the transfer price" has the potential for significant controversy when applied to transactions that are not pure cash transactions. NPRM at ¶ 88. In an era when the Commission has expressed concern about its having the level of resources required to fulfill all of its congressionally-mandated responsibilities, imposing an easy-to-administer antitrafficking restriction on licenses obtained through preferences makes far more sense than attempting to administer a system of financial disincentives that will only result in more litigation for the Commission.

#### **CONCLUSION**

CIRI welcomes the opportunity to participate in this landmark rulemaking proceeding. As indicated in these Comments, CIRI believes that Congress' direction to the Commission is clear with respect to the mandate to establish a competitive bidding regime sensitive to minorities and others who have traditionally encountered barriers to entry into capital-intensive enterprises.

For the reasons stated above, CIRI urges the Commission to adopt proposals to afford minorities enhanced opportunities to participate in spectrum-based services while establishing strict eligibility requirements and other